

<sup>3</sup> The Board notes that, following the October 21, 2020 OWCP decision and on appeal, appellant submitted additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On November 20, 2008 appellant, then a 65-year-old cook foreman, filed an occupational disease claim (Form CA-2) that he developed delayed onset of post-traumatic stress disorder (PTSD) due to "forcible constructive termination on or about August 6, 1978." He noted that he first became aware of his claimed condition and realized its relationship to his federal employment on February 15, 2004. Appellant explained that he had not filed his claim within 30 days of becoming aware of his employment-related condition because he was not diagnosed until February 15, 2004. On the reverse side of the claim form the employing establishment indicated that he resigned from his position in 1978.

In a November 21, 2018 statement, appellant explained that on February 15, 2004 he was diagnosed with delayed onset of PTSD due to the constructive discharge by the employing establishment on August 6, 1978. He alleged that he promptly notified the employing establishment in 2004 when he learned of his mental impairment.

In a December 15, 2008 letter, the employing establishment controverted appellant's claim, asserting that he failed to file his occupational disease claim within the three-year time limitation. It noted that he was first aware of his work-related PTSD condition in 2004, which was more than three years ago.

By decision dated July 10, 2009, OWCP denied appellant's occupational disease claim, finding that it was untimely filed pursuant to 5 U.S.C. § 8122.

On July 23, 2009 appellant, through his then-counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 23, 2009. Appellant explained that when he received his PTSD diagnosis in 2004 he informed the employing establishment and was told to file a claim with the Equal Employment Opportunity Commission (EEOC). He indicated that he argued with them for almost two years and then filed a claim in civil court. Appellant alleged that he was not advised to file a workers' compensation claim until October 2008.

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<sup>4</sup> Docket No. 10-0673 (issued November 22, 2010), *denying petition for recon.*, Docket No. 10-0673 (issued June 10, 2011); Docket 14-0141 (issued May 14, 2014); Docket No. 16-0746 (issued June 1, 2016); Docket No. 16-1521 (issued February 3, 2017); Docket No. 19-0036 (issued May 21, 2019).

Appellant subsequently submitted various documents dated from 2005 through 2007 from the EEOC and from federal district court regarding complaints that he had filed for disability due to delayed onset PTSD as a result of forceful resignation from federal employment.

By decision dated December 14, 2009, OWCP's hearing representative affirmed the July 10, 2009 decision.

Appellant appealed to the Board. By decision dated November 22, 2010, the Board affirmed the December 14, 2009 decision, finding that his occupational disease claim was untimely filed pursuant to 5 U.S.C. § 8122.<sup>5</sup>

Appellant continued to request reconsideration.

In nonmerit decisions dated January 5, 2011, July 12, 2013,<sup>6</sup> February 24 and<sup>7</sup> July 7, 2016,<sup>8</sup> June 21, 2017, and July 2, 2018, OWCP denied reconsideration of the merits of the claim.

Appellant appealed the July 2, 2018 decision to the Board.

By decision dated May 21, 2019, the Board affirmed the July 2, 2018 nonmerit decision.<sup>9</sup>

On January 3, 2020 appellant requested reconsideration.<sup>10</sup> He recounted that the May 21, 2019 decision indicated that he did not notify his employing establishment of his claim within 30 days of the last date of his employment exposure. Appellant reiterated that he could not have notified his employing establishment within 30 days of August 1978, the last date of his exposure, because he was not diagnosed with delayed onset PTSD until February 15, 2004. He also reported that the diagnosis did not exist in 1978 and was not recognized by the American Psychiatric Association (APA) until 1980. Appellant contended that it was impossible for him to file his claim within 30 days of his last exposure.

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<sup>5</sup> Docket No. 10-0673 (issued November 22, 2010), *petition for recon. denied*, Docket No. 10-0673 (issued June 10, 2011).

<sup>6</sup> Appellant appealed OWCP's July 12, 2013 decision to the Board. By decision dated May 14, 2014, the Board affirmed the nonmerit decision. Docket No. 14-0141 (issued May 14, 2014), *order dismissing petition for recon.*, Docket No. 14-0141 (issued March 12, 2015).

<sup>7</sup> Appellant appealed OWCP's February 24, 2016 decision to the Board. By decision dated June 1, 2016, the Board set aside the February 24, 2016 nonmerit decision and remanded the case for OWCP to properly adjudicate the claim under the standard for an untimely request for reconsideration. Docket No. 16-0746 (issued June 1, 2016).

<sup>8</sup> Appellant appealed OWCP's July 7, 2016 decision to the Board. By decision dated February 3, 2017, the Board affirmed the nonmerit decision. Docket No. 16-1521 (issued February 3, 2017).

<sup>9</sup> Docket No. 19-0036 (issued May 21, 2019).

<sup>10</sup> Appellant filed a request for reconsideration from the Board's May 21, 2019 decision, however, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the November 22, 2010 Board decision was the most recent merit decision, OWCP's December 14, 2009 merit decision is the appropriate subject of possible modification by OWCP.

Appellant submitted various articles about the history of PTSD, which indicated that the condition of PTSD was first included in the APA *Diagnostic and Statistical Manual* in 1980.

In statements dated September 7 and October 9, 2019, appellant reiterated that it was not possible for him to notify his employing establishment within 30 days of his last exposure or to file his claim in 1978 because he was not diagnosed with delayed onset PTSD until February 15, 2004.

By decision dated October 21, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>11</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>12</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>13</sup>

OWCP's procedures require a review of the file to determine whether the request for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.<sup>14</sup> Timeliness is determined by the document receipt date of the reconsideration request, *i.e.*, the received date in the iFECS. If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.<sup>15</sup>

OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error on the part of it in its most recent merit decision. The request for reconsideration must establish, on its face, that such decision was erroneous.<sup>16</sup> The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP

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<sup>11</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application." 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.607.

<sup>13</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>14</sup> *Id.* at Chapter 2.1602.4.a (February 2016).

<sup>15</sup> *Id.* at Chapter 2.1602.4b (February 2016); *see also* *S.J.*, Docket No. 19-1864 (issued August 12, 2020); *W.A.*, Docket No. 17-0225 (issued May 16, 2017).

<sup>16</sup> *W.A., id.; D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

should deny the request by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>17</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for decision.

The most recent merit decision of OWCP was the Board's November 22, 2010 decision. Appellant had one year from the date of that decision to timely request reconsideration.<sup>18</sup> As OWCP did not receive his request for reconsideration until January 3, 2020, it was untimely filed.<sup>19</sup>

The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.<sup>20</sup> In denying appellant's request for reconsideration, OWCP incorrectly applied the standard of review for timely requests for reconsideration. The Board will, consequently, remand the case for application of the proper standard for untimely reconsideration requests, to be followed by the issuance of an appropriate decision.<sup>21</sup>

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>17</sup> *Supra* note 15 at Chapter 2.1602.5(a) (October 2011).

<sup>18</sup> *Supra* note 15.

<sup>19</sup> *Supra* note 17.

<sup>20</sup> *Supra* note 18.

<sup>21</sup> *See P.G.*, Docket No. 20-0244 (issued February 25, 2021); *R.S.*, Docket No. 20-0755 (issued January 4, 2021).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 21, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 2, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board